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No. 08-373

Supreme Court, U.S.
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In The

Supreme Court of the United States

Steven Smith,
Petitioner

v.

Consolidated Freightways, Inc.,
Respondent

On Petition for *Writ of Certiorari*
to the Supreme Court of the United States

Brief in Opposition to *Writ of Certiorari*

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QUESTIONS PRESENTED

I. Whether it was an error to dismiss Petitioner's workers' compensation claims as untimely?

II. Whether failure to grant Petitioner a hearing constituted a 14th Amendment violation?

III. Whether adjudication without a hearing to admit evidence and properly adduce facts is in accord with Petitioner's statutory rights under the controlling state and federal law?

PARTIES

STEVEN SMITH, a Claimant in a Pennsylvania Workers' Compensation claim.

Respondent named is **CONSOLIDATED FREIGHTWAYS, INC.,** Mr. Smith's Employer at the time of the alleged work injury who was self-insured under Pennsylvania law at that time and whose interest has devolved upon Conway, Inc., a successor in interest with regard to workers' compensation cases within the timeframe encompassed by the one brought by Mr. Smith.

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COUNTERSTATEMENT OF THE CASE

This matter began its long litigation history as a claim petition filed by Petitioner here, Steven Smith (hereinafter "Claimant") against his then Employer, Consolidated Freightways for workers' compensation benefits resulting from the alleged exposure to a chemical on or about February 28, 1996. That claim was litigated to conclusion before Pennsylvania Workers' Compensation Judge Kathleen Vallely. Judge Vallely issued a Decision under date of October 16, 1997 in which she found that Claimant had, in fact, been exposed to trichloroethane in the course and scope of his employment but that he had suffered no injury as a result thereof. Claimant filed a subsequent Petition claiming entitlement to reimbursement for medical expenses as a result of the exposure to the chemical referenced above. That Petition was similarly denied by Judge Vallely under date of November 30, 1998, in which Decision she found that while Claimant had been exposed, he incurred no medical expenses reasonable and necessary for the treatment of any condition related to that exposure.

Both of those Decisions by Judge Vallely (the original dismissal of the Claim Petition and the Denial of the Review Medical Petition), were appealed to the Workers' Compensation Appeal Board, Pennsylvania's first level appellate process for workers' compensation cases. The Appeal Board, in a Decision dated December 31, 1999, affirmed both Decisions of Judge Vallely. No further appellate action was taken by Claimant at that time.

Claimant filed a second Claim Petition on or about September 24, 2001 for the same alleged exposure. That Claim Petition was dismissed by Workers' Compensation Judge David Henry under date of March 26, 2002, finding not only was the claim barred by the doctrine of *res judicata*, but that the various charges of misconduct Claimant leveled against the Defendant were not relevant in the matter inasmuch as they went to the exposure that Judge Vallely had

found and did not in any way address either disability or entitlement to medical expenses. That Decision was affirmed by the Workers' Compensation Appeal Board under date of July 29, 2003. In turn, that Workers' Compensation Appeal Board Decision was affirmed by a Memorandum Opinion of our Commonwealth Court dated December 17, 2003 that held not only was the new Petition barred by the doctrine of *res judicata*, but the various materials alleged by Claimant to have been after discovered evidence or related to the conduct of Defendant provided absolutely no basis for the reopening of the underlying Decision and, even if they had, such reopening was barred by the time limits applicable to the reconsideration section of the Pennsylvania Workers' Compensation Act (Section 426), 77 P.S. § 871. The Pennsylvania Supreme Court denied a Petition for Allowance of Appeal filed by Claimant with regard to that Decision by the Commonwealth Court. Claimant then sought review by this Honorable Court with the filing of a Petition for Certiorari which was, along with its subsequent request for rehearing, denied by this Court by Final Order dated November 14, 2005.

During the pendency of that appeal process, Claimant had filed a third Claim Petition for the same alleged exposure on the same alleged date, on or about September 23, 2004. That Decision was dismissed by Workers' Compensation Judge Rosalie Parker. The subsequent appeal to the Workers' Compensation Appeal Board produced an affirmation of that Decision by Order dated March 31, 2006. The Appeal Board's Decision was affirmed by Order of the Commonwealth Court of Pennsylvania (again in a Memorandum Opinion) under date of November 15, 2006. Cross-Petitions for Allowance of Appeal (Defendant sought review of the denial of their request for attorney fees against Claimant's counsel under the Pennsylvania Rules of Appellate Procedure) were denied.

In the meantime, however, Claimant had filed yet another Petition on this matter in the nature of a Penalty

Petition. That Petition was dismissed by Workers' Compensation Judge Persifor Oliver (after Motion, Rule and hearing on the Rule) under date of December 19, 2005, in which he held that since there had never been an award of benefits or agreement for benefits, no penalties could possibly be awarded under the Pennsylvania Workers' Compensation Act. Claimant appealed that Decision to the Pennsylvania Workers' Compensation Appeal Board who affirmed. Claimant attempted to appeal to the Commonwealth Court of Pennsylvania, but that appeal was eventually dismissed by Order of the Court dated May 17, 2007 for Claimant's failure to comply with Court Orders requiring the filing of a brief which conformed to the Pennsylvania Rules of Appellate Procedure.

During the pendency of that appellate procedure, Claimant filed a fourth Claim Petition on or about July 19, 2006 alleging the same exposure to the same chemical on the same date. That Petition was dismissed by Workers' Compensation Judge David Torrey by Decision dated August 21, 2006 after Motion and Rule to Show Cause. Judge Torrey dismissed on the grounds of *res judicata* but also held that, to the extent that the claim by Petitioner at this time might be deemed to be alleging exposure to a different chemical or, in fact, a different variety of the same chemical, it was barred by the statute of limitations applicable to workers' compensation claims. (Section 315 Pennsylvania Workers' Compensation Act, 77 P.S. § 602). Even to the extent that a discovery rule would be applied to that statute of limitations in this regard, Claimant admitted in his pleadings and filings that the full and complete identity of the chemical to which he had been exposed back in 1996 was known to him at least as early as 2001. Thus, Judge Torrey again concluded that the Claim would be barred.

That Decision was appealed by Claimant to the Pennsylvania Workers' Compensation Appeal Board who affirmed Judge Torrey's Decision by Order dated May 23, 2007. No appeal was filed by Claimant from the Board's

Decision to the Commonwealth Court of Pennsylvania. Instead, responding to a civil lawsuit for abuse of process filed by the Employer against Claimant and his counsel in Common Pleas Court in Allegheny County, Claimant filed a document with the Pennsylvania Supreme Court seeking permission to appeal directly from the Appeal Board Decision to the Supreme Court. By letter dated June 12, 2007, the Pennsylvania Supreme Court Prothonotary returned that document to Claimant refusing to docket it as being completely outside of all known and accepted procedure before that Court.

Finally, Claimant filed a fifth Claim Petition alleging the same exposure on the same date in 1996, which was assigned to Workers' Compensation Judge Oliver and dismissed by him under date of January 30, 2007, again after Motion and Rule. The Pennsylvania Workers' Compensation Appeal Board again affirmed that dismissal by Order dated September 18, 2007, and at that point, Claimant filed a document which resulted in the Supreme Court ruling which Claimant alleges as the basis for his Petition for Writ of Certiorari to your Honorable Court. Claimant filed an Application for Extraordinary Relief under Pennsylvania Rule of Appellate Procedure 3309 seeking to invoke the Court's King's Bench Powers dealing with review of matters of overriding public importance that might otherwise escape review. That application was eventually denied by Per Curium Order dated June 25, 2008. Claimant has since withdrawn a Petition for Reconsideration filed with the Pennsylvania Supreme Court from that denial and now seeks review by your Honorable Court under a Writ of Certiorari.

ARGUMENT

Respondent respectfully submits that it takes nothing more than a brief review of the procedural history (tortured as that is) of this case in the Pennsylvania Workers' Compensation system to understand that nothing has occurred here that would warrant review by the United States Supreme Court under Rule 10. Surely, the most recent action by the Supreme Court of Pennsylvania, refusing King's Bench review of this matter has not decided any Federal question at all. Nor has it decided a question that conflicts with any other State Court of last record, nor of this or any other Federal Court. Instead, the Supreme Court of Pennsylvania has merely exercised its appropriate discretion under its own rules and 42 Pa. C.S.A. § 726, not to invoke King's Bench authority to further review what has gone on in this case.

Claimant here has filed five Claim Petitions, all of which have been denied or dismissed. Claimant has had multiple Appeals to the Workers' Compensation Appeal Board and has lost on each occasion. Claimant has twice been to the Commonwealth Court of Pennsylvania which held the underlying factual basis for Claimant's continuing pursuit of this case insufficient under Pennsylvania law. The Pennsylvania Supreme Court has on multiple occasions refused to hear this matter further. And this Court has previously denied a Writ of Certiorari. It is not at all clear how Claimant could urge or represent to this Court that he has not had benefit of due process of law. Losing does not represent a lack of due process.

Claimant now compounds the inappropriateness of his conduct in this matter by misrepresenting to this Honorable Court the time limits applicable to his action under Pennsylvania Workers' Compensation law. Claimant has represented to this Court that a 500 week time limit applies to this matter. It does not.

Under Pennsylvania law a workers' compensation claimant may receive up to 500 weeks of partial disability. Pa. W.C. Act § 306(b), 77 P.S. § 431. The Act further provides that a W.C.J. may review an award, a Notice of Compensation Payable, or a Supplemental Agreement for any mistake of fact or for certain changes of disability status "at any time." Pa. W.C. Act § 413(a), 77 P.S. §§ 771-774. In interpreting the interface between these two sections, our appellate courts have applied the 500 week period in § 306(b) as a limiting factor on the "at any time" phrase in § 413(a).[1] All circumstances where the 500 week limit is applicable involve, however, cases where liability for benefits under the Act was mutually agreed upon or awarded after litigation. It absolutely does not apply to cases where no liability for benefits has previously attached.

Pennsylvania law is quite clear with regard to such cases where liability has not yet attached that the 3 year statute of limitations in Section 315 of the Act (77 P.S. § 602) applies. It has been interpreted as a statute of repose. Bellefonte Area School District v. W.C.A.B., 627 A.2d 250 (Pa. Cmwlth. 1993), aff'd 680 A.2d 823 (Pa. 1994). As such, its passage extinguishes all rights under the Act. Judge Torrey in his Decision back in August of 2006 so held. The Workers' Compensation Appeal Board affirmed Judge Torrey's Decision. No further appeal from that was ever taken. Accordingly, Judge Torrey's ruling that Claimant is outside the statute of limitations for filing any new workers' compensation claim in Pennsylvania is now final, unappealed, and *res judicata*.

Claimant in this matter has filed multiple Petitions for the same claim. He lost initially on the grounds that he was not disabled from the exposure that he received nor did he

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[1] Chiefly, this applies in cases of suspension of benefits in the presence of ongoing disability but no loss of earnings or attempts to reinstate total disability benefits after receipt of 500 weeks of partial disability benefits. See, Stewart v. W.C.A.B., 756 A.2d 655 (Pa. 2000) and Stehr v. W.C.A.B., 936 A.2d 570 (Pa. Cmwlth. 2007).

suffer any medical expense as a result. That determination by Workers' Compensation Judge Vallely back in 1997 and 1998, has long since been final. Claimant's multiple attempts to reopen that with new Petitions of varying kinds have been uniformly and universally dismissed under the doctrine of *res judicata*.

References in the Petition for Writ to estoppel, alleged misconduct by the Employer in 1996, alleged after discovered (in 2001) evidence, Hazardous Substance Regulations, equity, Right to Know Laws and errors of law or fact committed in 1996 are all irrelevant to this case. Claimant lost in 1996. That loss is long since final. Claimant failed to file any timely or meaningful Petition pursuant to the proper procedural mechanism for presenting after-discovered evidence (§ 426 of the Pa. W.C. Act) concerning the consequences he now says flowed from his discovery of the "Chemrex MSDS" in 2001. According to the 2003 Decision of the Commonwealth Court of Pennsylvania, he is now time barred from pursuing that remedy. And finally, Claimant is time barred under the applicable statute of limitations from bringing any new petition for a 1996 injury.

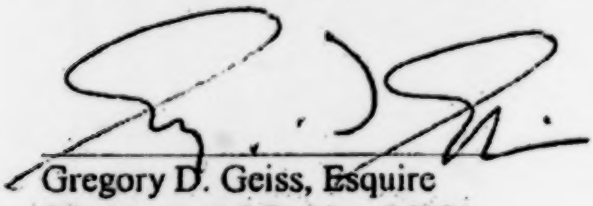
It can readily been seen that this Claimant has no further recourse to legal action in the Pennsylvania Workers' Compensation system on account of any alleged exposure in February of 1996 to anything. That he continues to pursue it is unfortunate. That he is represented by counsel in his repeated attempts and patent abuse of process is disturbing. Nevertheless, those matters are not before this Court. It can, however, readily been seen that no important Federal question, no matter of Constitutional import, and no conflict with any other State Court of last resort on any such issue is presented in this matter. It is purely a state matter and, as such, should receive no review by this Court.

CONCLUSION

For the reasons stated heretofore, Respondent respectfully submits that this Writ for Certiorari has been improvidently filed with Your Court and should be denied.

Respectfully submitted,

FARRELL & FRATICELLI, P.C.

By: 

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